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No. _____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

KEVIN P. MADDEN, CHARLES J. OSWALD, and RICHARD W. KURRE, Individually and as Representatives of a Class of Persons,

Petitioners,

vs.

JEFFREY M. GLUCK, DEBRA MCALEAR GLUCK and LANDMARK ST. LOUIS BANK, N.A.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

Whether the United States Court of Appeals for the Eighth Circuit erred in affirming the dismissal of the Complaint for failure to state a claim under the Racketeer Influenced and Corrupt Orgnizations Act (18 U.S.C. §1961-68) by holding that a "pattern of racketeering activity" necessarily requires more than one fraudulent scheme, and that without more, a RICO violation is not alleged.

PARTIES BELOW

The caption hereof contains the names of all parties to the proceedings in the district court and court of of appeals. However, Petitioners were (and are) acting individually and as representatives of a class consisting of every person who was a payee on a check drawn by the St. Louis Globe-Democrat, Inc. on one of its accounts at Landmark St. Louis Bank, N.A. between February 24, 1984 and August 31, 1985, which was dishonored when presented to Landmark for payment.

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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

KEVIN P. MADDEN, CHARLES J. OSWALD, and
RICHARD W. KURRE, Individually and as
Representatives of a Class of Persons,

Petitioners,

vs.

JEFFREY M. GLUCK, DEBRA MCALEAR GLUCK
and LANDMARK ST. LOUIS BANK, N.A.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioners, Kevin P. Madden, Charles J. Kurre and Richard W. Kurre, respectfully petition this Court to issue its writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit filed in this case in February 11, 1987.

OPINIONS BELOW

The United States Court of Appeals for the Eighth Circuit issued its opinion in this cause on February 11, 1987, which is set forth in Appendix A hereto and is reported as *Madden v.*

Gluck, 815 F.2d 1163 (8th Cir.1987). The opinion of the district court is set forth in Appendix D and reported as *Madden v. Gluck*, 636 F.Supp. 463 (E.D.Mo.1986).

JURISDICTION OF THIS COURT

The opinion of the court of appeals was filed on February 11, 1987. The petition for rehearing was denied on March 9, 1987. Jurisdiction to review the judgment below is conferred upon this Court by 28 U.S.C. §1254(1) and §2101(c).

APPLICABLE STATUTORY PROVISIONS

The issues presented for review involve provisions of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§1961-1968 ("RICO"), and of Laws Relating to Crimes and Criminal Procedure, 18 U.S.C. §§1341 and 1343, specifically:

§1961. Definitions:

As used in this chapter -

(1) "racketeering activity" means...

(B) any act which is indictable under any of the following provisions of the Title 18, United States Code:...section 1341 (relating to mail fraud), Section 1343 (relating to wire fraud)...

. . .

(5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity...

§1962. Prohibited Activities:

...

(c) It shall be unlawful for any person employed by or associated with any enterprise entered in or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such

enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section.

§1964. Civil Remedies:

. . .

(c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

§1341. Frauds and swindles:

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations; or promises. . . for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon. . . shall be fined not more than $1,000 or imprisoned not more than five years, or both.

§1343. Fraud by wire, radio, or television:

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

STATEMENT OF THE CASE

Petitioners, individually and as representatives of a class of approximately 650 former employees and other creditors of the defunct St. Louis Globe-Democrat, Inc. ("Globe") instituted a civil action ("Complaint") against Respondents, Jeffrey M. and Debra McAlear Gluck ("Glucks") the principal officers, directors, and sole shareholders of the Globe and its depository bank, Respondent, Landmark St. Louis Bank, N.A. ("Landmark").

The Complaint alleges that the Globe published a daily newspaper in St. Louis, Missouri and was an "enterprise" engaged in and affecting commerce as defined in the RICO statute and that on February 24, 1984, Glucks acquired control of the Globe. Thereafter, for a period of nineteen continuous months until the Complaint was filed, Glucks maintained their interest in and control of the Globe, and conducted its affairs through a "pattern of racketeering activity" which consisted of committing numerous acts of mail and wire fraud proscribed by 18 U.S.C. §§1341 and 1343 ("Fraudulent Schemes").

The object of the Fraudulent Schemes was to artificially and fraudulently prolong the life of the Globe by creating a false illusion of its solvency and ability to pay its debts so as to enable Glucks to loot, waste and divert the Globe's assets for their own personal enrichment.

The Fraudulent Schemes perpetrated by Respondents, included check kiting which involved, during the first eight months of 1985 alone, the dishonor of 5,643 checks with a total value of $4,264,038.66; falsifying the Globe's accounting books and records; delivering false financial statements to potential creditors, and intentionally failing to deliver agreed collateral to its principal lender. They also involved the diversion of substantial corporate funds for Glucks' own personal benefit as well as the improper diversion of some $775,000 which had been withheld from the wages and salaries of Globe employees for

withholding and social security taxes, vacation pay, union dues, insurance premiums, United Way contributions and U.S. Savings Bonds purchases.

The Complaint further alleges that Landmark, became associated with the Globe in 1984 and thereafter participated, directly and indirectly with Glucks, in the conduct of the Globe's affairs through the same pattern of racketeering activity. Landmark was the Globe's sole and exclusive depository bank so that all revenues were deposited into and disbursed through one or more of its accounts at Landmark. Landmark had knowledge of every check drawn on the Globe accounts, including those dishonored, and maintained daily contact with Glucks and other Globe employees so that it was intimately aware of all of the Globe's affairs. Landmark profited from the check kiting by levying service charges on the Globe's accounts which were measured, in part, by the number of checks dishonored upon presentment which amounted to $93,703.92 in the first seven months of 1985 alone.

The Complaint concludes by averring that Petitioners were injured in their business or property in the amount of $4,264,038.66 as a direct result of Respondents conducting and participating in the Globe affairs through a pattern of racketeering activity.

Count II is virtually identical to Count I except it pertains to a sub-class of about 350 persons consisting of only Globe employees who were recipients of dishonored checks. Count III alleges that Glucks and Landmark conspired to commit the acts in Counts I and II in violation of 18 U.S.C. §1962(d) and committed described overt acts in furtherance of that conspiracy.

The district court granted Respondents' motion to dismiss for failure to state a claim upon which relief may be granted finding that the Complaint failed to adequately allege a "pattern of racketeering activity". The United States Court of Appeals for the Eighth Circuit affirmed.

BASIS FOR FEDERAL JURISDICTION

The district court's jurisdiction was invoked pursuant to 18 U.S.C. §1964(a) and (c) in that this was an action for damages and other civil relief instituted by Petitioners as persons injured in their business or property by reason of Respondents' violation of 18 U.S.C. §1962. The United States Court of Appeals had jurisdiction pursuant to 18 U.S.C. §1291 in that this case was presented to it as an appeal of a final judgment of a district court of the United States.

REASONS FOR GRANTING THE WRIT

I.

The Decision Below Conflicts With Decisions Rendered By The United States Courts of Appeal for the First, Second, Fifth, Seventh And Eleventh Circuits On The Same Issue.

As the basis for its decision affirming the dismissal of the Complaint, the Eighth Circuit held (Opinion below, Appendix A, p. A-3):

> "*[a] 'pattern of racketeering activity' requires more than one fraudulent scheme.*" In this case, Appellants allege only a scheme to keep the Globe afloat in order to loot it. Without more, the 'pattern of racketeering' element of a RICO violation has not been alleged (Emphasis added)."

The issue presented in this petition for writ of certiorari is whether the Eighth Circuit erred in affirming the dismissal of the Complaint for failure to state a claim by holding that a "pattern of racketeering activity" necessarily requires more than one fraudulent scheme, and that without more, a RICO violation is not alleged.

As pertains to this action, "racketeering activity" is defined in 18 U.S.C. §1961(1) as follows:

> "[R]acketeering activity" means . . . (B) any act which is indictable under any of the following provision of title 18, United States Code: . . . . Section 1341 (relating to mail fraud [or] Section 1343 (relating to wire fraud) . . . ."

The RICO statute does not define "pattern of racketeering activity", but merely sets forth a minimum requirement at 18 U.S.C. §1961(5) which provides:

> "[P]attern of racketeering activity "requires at least two acts of racketeering activity . . . ."

This clear and unambiguous statutory language indicates that the "pattern" relates to *predicate acts* and nothing else.

In *Sedima S.P.R.L. v. Imrex,* ____ U.S. ____, 105 S.Ct. 3275(1985), this Court suggested, without finding, that two predicate acts alone might not be insufficient to constitute a pattern, and in defining "pattern", it observed (105 S.Ct. at 3285, n.14):

> "Significantly, in defining "pattern" in a later provision of the same bill, Congress was more enlightening: "criminal conduct forms a pattern if it embraces criminal acts that have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events". 18 U.S.C. §3575(e). This language may be useful in interpreting other sections of the Act."

Subsequent to *Sedima,* the "pattern" issue was considered in *R.A.G.S. Couture, Inc. v. Hyatt,* 774 F.2d 1350 (5th Cir. 1985). There, the Fifth Circuit found that two acts of mail fraud pursuant to the same scheme or artifice to defraud which occurred about five months apart were sufficient to constitute a "pattern of racketeering activity", although the court did not articulate a specific definition of that term.

Next, in *Bank of America National Trust and Savings Association v. Touche Ross & Co.,* 782 F.2d 966 (11th Cir. 1986), the Eleventh Circuit considered the necessity for more than a single fraudulent scheme, stating (l.c. 971):

> "Defendants urge this court to adopt a rule under which the predicate acts must occur in different criminal episodes in order to satisfy the pattern requirement. In this case all the alleged acts of wire and mail fraud were part of a single scheme. Defendants' interpretation, however, not only ignores the language of §3575(e) quoted by the *Sedima* Court but also contradicts the rule of this circuit. *Acts that are*

> *part of the same scheme or transaction can qualify as distinct predicate acts* (Emphasis added)".

Thereafter, the Eighth Circuit decided *Superior Oil Company v. Fulmer,* 785 F.2d 252 (8th Cir. 1986), and evolved its theory that a "pattern of racketeering activity" requires more than one fraudulent scheme and holding that multiple predicate acts do not constitute a "pattern" within the meaning of the RICO statute if they are committed pursuant to a single comprehensive scheme to defraud.

This "multiple fraudulent schemes" theory was considered in *Morgan v. Bank of Waukegan,* 804 F.2d 970 (7th Cir. 1986). In rejecting the Eighth Circuit's rationale, the Seventh Circuit followed the Eleventh Circuit stating (l.c. 975):

> "However, the proposition that the predicate acts must always occur as part of separate schemes in order to satisfy the continuity aspect of the pattern requirement focuses excessively on continuity, and therefore cannot be accepted as a general rule. *Otherwise defendants who commit a large and ongoing scheme, albeit a single scheme, would automatically escape RICO liability for their acts, an untenable result* (Emphasis added)."

The "multiple fraudulent schemes" prerequisite was next considered in *United States v. Ianniello,* 808 F.2d 184 (2nd Cir. 1986). There, the Second Circuit joined the others in rejecting the Eighth Circuit's concept by finding that to require more than one fraudulent scheme was "a strained and inappropriate reading of the statutory language (l.c.192)". They further found that such a requirement would effectively eliminate §1962(b) and concluded by stating (l.c. 192):

> "We decline to embrace this incongruous result. Instead, we hold that when a person commits at least two acts that have the common purpose of furthering a continuing

> criminal enterprise with which that person is associated, the elements of relatedness and continuity which the *Sedima* footnote construes section 1962(c) to include are satisfied."

At this point, it is noteworthy to mention that in its decision in the instant case, the Eighth Circuit recognized the conflict with the Second Circuit, but did not choose either reconsider or reconcile its "multiple fraudulent schemes", stating (Opinion below, Appendix A, p. A-3, n.1):

> "We are aware of the recent Second Circuit decision criticizing our holding in *Superior Oil,* and holding that two predicate acts committed with the common purpose of furthering a continuing criminal enterprise provide the continuity and relatedness apparently required by footnote 14 of *Sedima* . . . Nonetheless, we adhere to our position in *Superior Oil.*"

Most recently, the definition of "pattern of racketeering activity" was considered in *Roeder v. Alpha Industries, Inc.*, 814 F.2d 22 (1st Cir. 1987). The First Circuit joined the others in rejecting the Eighth Circuit's "multiple fraudulent schemes" theory on the basis that it would permit defendants who commit a large ongoing single scheme to automatically escape RICO liability, stating (l.c. 31):

> "We decline to adopt a definition of pattern that relies solely on whether activity can be classified as a single scheme or episode."

Based on the above cases, it is clear that the decision of the Eighth Circuit in the present case and its finding that more than a single fraudulent scheme is necessary before a "pattern of racketeering activity" can be found is in direct conflict and diametrically opposed to the above decisions of the First, Second, Fifth, Seventh and Eleventh Circuits.

II.

The Decision Below Conflicts With Decisions Of This Court.

In *Sedima,* this Court specifically found that (105 S.Ct. at 3285):

> " '[r]acketeering activity' consists of no more and no less than the commission of a *predicate act* [emphasis added] . . ."

Then continued (105 S.Ct. 3286):

> "[t]he compensible injury necessarily is the injury caused by *predicate acts* sufficiently related to constitute a *pattern* (emphasis added) . . . ."

In other words, this Court has clearly stated that under the RICO statute, "pattern" relates to *predicate acts* and nothing else. There is nothing even remotely contained in the statute or in *Sedima* that would suggest a requirement that there need be more than one fraudulent scheme to constitute a "pattern of racketeering activity".

Even the dissenting opinion of Mr. Justice Powell in *Sedima,* reflects consistency of the Supreme Court's "pattern" definition and its reference to predicate acts (105 S.Ct. at 3270):

> " '[p]attern' should be interpreted as requiring that (i) the racketeering acts be related to each other, (ii) they be part of *some common scheme,* and (iii) some sort of continuity between the acts or a threat of continuing criminal activity must be shown." [Emphasis added]

In other words, not only is the necessity for multiple fraudulent schemes negated, but it is specifically suggested that a single fraudulent scheme is necessary to link the predicate acts together so as to form a "pattern of racketeering activity".

Previous to *Sedima,* this Court considered the "pattern" definition in *United States v. Turkette,* 452 U.S. 574, 101 S.Ct.

2524 (1981). In examining the issue, this Court stated (101 S.Ct. at 2528):

> "The pattern of racketeering activity is . . . a series of criminal acts as defined by the statute . . . ."

Accordingly, the Eighth Circuit's finding that "pattern of racketeering activity" relates to fraudulent schemes rather than predicate acts is a clear conflict with the statutory provisions of RICO as interpreted by this Court.

CONCLUSION

The Complaint avers numerous episodes of a vast array of fraudulent activities in violation of 18 U.S.C. §1341 (mail fraud) and §1343 (wire fraud) perpetrated to create the false illusion of financial solvency. These included a check kiting scheme encompassing over 5,643 checks totalling $4,264,038.66; falsifying accounting records; preparation and delivery of false financial statements, and the diversion of corporate assets including $775,000 withheld from or owing to Globe employees for taxes, union dues, health insurance premiums, savings bond purchases, vacation pay and United Way contributions (*cf.* Opinion below, Appendix A, p.A-2).

These criminal activities spanned a nineteen month period commencing when Respondents initially became associated with the Globe (February 24, 1984) an were continuing at the time of the filing of the Complaint (November 14, 1985). Approximately 650 persons and organizations were victims of these crimes. These certainly cannot be characterized as "isolated events", "sporadic activity" or "isolated acts of racketeering activity" to which this Court referred in *Sedima* (105 S.Ct. at 3285, n.14). Rather, it clearly describes criminal activity having "continuity plus relationship which combines to produce a pattern" (*Id*).

Assume for a moment that in addition to the many separate acts of mail and wire fraud, the complaint here further alleged that over the same nineteen month period, Respondents com-

mitted numerous acts of arson in order to collect the insurance proceeds; coerced employees, by threats of violence, to kickback a percentage of their paychecks; used their interstate wire network for transmission of gambling information; embezzled employees' pension and welfare funds; sold Globe securities to the public through fraudulent misrepresentations and utilized their newspaper delivery network for the distribution and trafficking in narcotic drugs. Assume further that these acts were all done pursuant to the same "one fraudulent scheme . . . to keep the Globe afloat in order to loot it" referred to by the Eighth Circuit in its opinion. Even under these circumstances, Respondents would be completely immune from the RICO statute (both criminally and civilly) because (according to the Eighth Circuit's opinion) a pattern of "racketeering activity" cannot exist in absence of more than one fraudulent scheme.

In other words, the Eighth Circuit's definition of "pattern of racketeering activity" would prohibit any possible violation of the RICO statute irrespective of the nature, extent, duration or interrelationship of predicate acts if they were only performed in furtherance of a single comprehensive criminal scheme. Obviously, this would not be the result envisioned by Congress or by the rationale of this Court in *Sedima* and *Turkette*. Further, it is in clear conflict with the decisions of the First, Second, Fifth, Seventh and Eleventh Circuits on this issue.

Accordingly, a petition for writ of certiorari should be issued to the United States Court of Appeals for the Eighth Circuit to review its judgment in this case.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 86-1917

Kevin P. Madden, Charles J. Oswald and Richard W. Kurre,
Appellants,

vs.

Jeffrey M. Gluck, Debra McAlear Gluck, and
Landmark St. Louis Bank,
Appellees.

Appeal from the United States District Court
for the Eastern District of Missouri

Submitted: January 14, 1987
Filed: February 11, 1987

Before Lay, Chief Judge, and Heaney and Arnold, Circuit Judges.

PER CURIAM.

Appellants, representatives of an uncertified class of employees and creditors of the defunct St. Louis Globe Democrat, Inc., challenge the district court's dismissal of an action they brought against Jeffrey M. Gluck, Debra McAlear Gluck, and Landmark St. Louis Bank (collectively referred to as appellees) alleging violations of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-68 (RICO). We affirm.

Since the district court dismissed the appellants' claim pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure to state a cause of action, we must view the facts alleged in their complaint in the light most favorable to them. *See Bennett v. Berg*, 685 F.2d 1053, 1057 (8th Cir. 1982), *cert. denied*, 464 U.S. 1008 (1983). So viewed, the complaint alleges that from February of 1984, to the time the complaint was filed, the Glucks dominated and controlled the activities of the Globe with the sole purpose of prolonging its life by creating an illusion that the company was solvent and able to pay its debts. The complaint further alleges that the Glucks engaged in such activities in order to divert the Globe's assets to their own use and later sell their Globe stock for the highest price obtainable.

In furtherance of this scheme, the complaint alleges that the appellees engaged in a vast array of fraudulent activities by use of the mail and wire in violation of 18 U.S.C. § 1314 (mail fraud) and 18 U.S.C. § 1343 (wire fraud). The alleged acts include: (1) a check kiting scheme whereby, during the first eight months of 1985, the Glucks drew 5,643 checks totaling $4,264,038.66 on Landmark St. Louis Bank (Landmark) which were returned because the Globe's accounts contained insufficient funds and on which Landmark received a total of $93,708.92 in bad check fees; (2) diversion of the Globe's corporate assets including funds totalling $775,000 withheld from or owing to Globe employees for taxes, union dues, health insurance premiums, savings bond purchases, earned vacation pay, and United Way contributions; and (3) defrauding of creditors by preparing and distributing false financial statements and by failing to comply with the terms of a financing agreement with Citicorp Industrial Credit Corporation.

On June 25, 1986, the district court granted the appellees' motion to dismiss for failure to state a claim upon which relief may be granted finding that the complaint failed to adequately allege a "pattern of racketeering activity" as the term has been construed by the United States Supreme Court and this Court.

The court, applying our recent decision in *Superior Oil Co. v. Fulmer,* 785 F.2d 252 (8th Cir. 1986), found that although the alleged acts were sufficiently related to form a pattern, they constituted mere subdivisions of only one fraudulent scheme. Thus, the court found that the alleged acts lacked sufficient continuity to form a "pattern of racketeering activity."

Review of the district court's memorandum opinion reveals that it is fully consistent with our decision in *Superior Oil,* which we subsequently reaffirmed in *Holmberg v. Morrissette,* 800 F.2d 205 (8th Cir. 1986).[1] In those cases we held that a "pattern of racketeering activity" requires more than one fraudulent scheme. In this case, appellants allege only a scheme to keep the Globe afloat in order to loot it. Without more, the "pattern of racketeering" element of a RICO violation has not been alleged. Accordingly, we affirm.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

---

[1] We are aware of the recent Second Circuit decision criticizing our holding in *Superior Oil,* and holding that two predicate acts committed with the common purpose of furthering a continuing criminal enterprise provide the continuity and relatedness apparently required by footnote 14 of *Sedima, S.P.R.L. v. Imrex Co., Inc.,* 473 U.S. ____, 105 S.Ct. ____, 87 L.Ed.2d 346, 358-59 n.14 (1985). *See United States v. Ianniello,* slip op. No. 86-1088 (2d Cir. Dec. 4, 1986). Nonetheless, we adhere to our position in *Superior Oil.*

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 86-1917EM

Kevin P. Madden, et al.,
Appellants,

vs.

Jeffrey M. Gluck, et al.,
Appellees.

Appeal from the United States District Court
for the Eastern District of Missouri

JUDGMENT
(Filed March 20, 1987)

This appeal from the United States District Court was submitted on the record of the said district court, briefs of the parties and was argued by counsel.

Upon consideration of the premises, it is hereby ordered and adjudged that the judgment of the district court is affirmed in accordance with the opinion of this Court.

February 11, 1987

A true copy.

Attest: /s/ Robert D. St. Vrain

Clerk, U. S. Court of Appeals, Eighth Circuit

MANDATE ISSUED: MARCH 19, 1987

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 86-1919EM

Kevin P. Madden, et al.,
Appellants,

vs.

Jeffrey M. Gluck,
Appellees.

Appeal from the United States District Court
for the Eastern District of Missouri

Appellants' petition for rehearing en banc has been considered by the Court and is denied.

Petition for rehearing by the panel is also denied.

March 9, 1987

Order entered at the Direction of the Court:

/s/ Robert D. St. Vrain
Clerk, U. S. Court of Appeals, Eighth Circuit.

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 85-2703C(6)

Kevin P. Madden, et al.,
Plaintiffs,

vs.

Jeffrey M. Gluck, et al.,
Defendants.

MEMORANDUM

(Filed June 25, 1985)

This class action is brought under the Racketeer Influenced & Corrupt Organizations Act, 18 U.S.C. §§1961-1968 (RICO) for equitable and monetary relief, against the former officers and owners of the St. Louis Globe Democrat, Inc. (the Globe) and the corporation's depository bank. Plaintiffs constitute a class identified as every person who is a payee on a check drawn by the Globe on one of its accounts at defendant Landmark St. Louis Bank, N.A. (Landmark) between February 24, 1984 and August 31, 1985, which was dishonored when presented to Landmark for payment. A sub-class is defined as those members of the class who were employees of the Globe.

The complaint alleges that defendants engaged in a "check kiting scheme" involving 5,643 checks having a value of over $4,000,000, for the purpose of creating a false illusion of the Globe's solvency thereby prolonging its life so that its owners, defendants Gluck, could divert corporate assets for their own benefit. This fraudulent scheme was allegedly accomplished through multiple acts of mail and wire fraud, namely, mailing dishonored checks and false monthly bank statements and

transmitting instructions to defendant Landmark to transfer funds in or out of accounts, in violation of 18 U.S.C. §1962(c). Landmark allegedly knew or should have known of the scheme and benefited therefrom by receiving fees and service charges of $93,702.92 from the Globe. The complaint also alleges that the Glucks and Landmark conspired to commit these acts in violation of 18 U.S.C. §1962(d).

Now under consideration are the Gluck's and Landmark's separate motions to dismiss the complaint for failure to state a claim. In considering a motion to dismiss, the Court must view the facts alleged in the complaint in the light most favorable to the plaintiffs. "[A] complaint should not be dismissed unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Bennett v. Berg,* 685 F.2d 1053, 1057 (8th Cir. 1982), *cert. denied,* 464 U.S. 1008 (1983).

Defendants argue that plaintiffs failed to sufficiently plead all the elements of a private cause of action under RICO. The Court agrees, concluding that defendants' alleged conduct, if proven, would not constitute a "pattern of racketeering activity" as that term is construed by the United States Supreme Court and the Eighth Circuit Court of Appeals.

Title 18 U.S.C. §1964 grants a private right of action to "[a]ny person injured in his business or property by reason of a violation of section 1962" of the Act. Section 1962(c), the section upon which plaintiffs rely in Counts I and II, prohibits any person from operating an enterprise engaged in or affecting interstate commerce through a pattern of racketeering activity; §1962(d), the basis of Count III, prohibits conspiring to commit such acts. "Racketeering activity" is defined by the Act in §1961(c) as including a wide range of criminal acts including any act indictable under the federal mail and wire fraud statutes, 18 U.S.C. §§1341 and 1343. Section 1961(5) of RICO states that "a pattern of racketeering activity requires at least two acts of

racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years . . . after the commission of a prior act of racketeering activity."

In *Sedima, S.P.R.L. v. Imrex Co.*, 105 S.Ct. 3275 (1985), the Supreme Court held that "[a] violation of §1962(c) . . . requires (1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity." In footnote 14, *id.* at 3285, the Court suggested that the "pattern" element requires a showing of criminal conduct characterized by "continuity plus relationship."

This two-prong test of "pattern" was recently adopted and applied by the Eighth Circuit Court of Appeals in *Superior Oil Co. v. Fulmer*, 785 F.2d 252 (8th Cir. 1986). The Court there held that while the plaintiff had proven the "relationship" prong by proving multiple acts of wire fraud on the part of the defendants in pursuit of their scheme to convert gas from the plaintiff's interstate pipeline, it failed to prove the "continuity" sufficient to form a "pattern" of racketeering acitvity: "The actions of [defendants] comprise one . . . scheme . . . There was no proof that [defendants] had ever done these activities in the past and there was no proof that they were engaged in other criminal activities elsewhere." *Id.* at 257. The Court cited with approval several "post-*Sedima*" opinions wherein the district courts dismissed RICO claims based upon allegations of multiple predicate acts in furtherance of a single fraudulent scheme. *Id.* at 257-58 n.8. *See also Allright Missouri, Inc. v. Billeter*, No. 84-1488C(6), slip op. at 2-3 (E.D.Mo. April 1, 1986) (allegations of multiple interrelated acts of wire fraud underlying alleged injury-causing violations of federal and state securities laws, all undertaken for the purpose of effecting a transfer of real estate from one limited partnership in which plaintiffs had interests to another, did not satisfy the "continuity" prong of a RICO "pattern"); *Clodfelter v. Thuston*, No. 85-1713C(6), slip op. at 7-9 (E.D.Mo. June 24, 1986) (allega-

tions that general partners mismanaged and misappropriated plaintiffs' cash contribution to the partnership by means of violations of federal securities laws and multiple acts of mail fraud did not satisfy the "continuity" prong of a RICO "pattern").

In the present case the Court concludes that the alleged predicate acts of mail and wire fraud constitute subdivisions of one fraudulent scheme and as such fail to meet the pattern requirement for RICO liability. There are no allegations that defendants have done these activities in the past nor that they were engaged in other criminal activities elsewhere.

Accordingly, plaintiffs' complaint is dismissed for failure to state a claim upon which relief may be granted.

Dated this 25th day of June, 1986.

/s/ George F. Gunn, Jr.
UNITED STATES DISTRICT JUDGE

(2)

Supreme Court, U.S.
FILED
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No. 86-1923

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

KEVIN P. MADDEN, CHARLES J. OSWALD, and RICHARD W. KURRE, Individually and as Representatives of a Class of Persons,

Petitioners,

vs.

JEFFREY M. GLUCK, DEBRA McALEAR GLUCK and LANDMARK ST. LOUIS BANK, N.A.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF FOR RESPONDENT LANDMARK ST. LOUIS BANK IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Whether Petitioners stated a cause of action under RICO where they sought to characterize a single, isolated fraudulent episode as a "pattern" by alleging each use of the mails or wires in furtherance of that single episode as separately chargeable fraudulent acts.

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Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF FOR RESPONDENT LANDMARK ST. LOUIS BANK IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App. A-1) is reported at 815 F.2d 1163 (8th Cir. 1987). The opinion of the District Court (Pet. App. A-6) is reported at 636 F.Supp. 463 (E.D.Mo. 1986).

JURISDICTION

The Court of Appeals entered judgment on February 11, 1986. The Court denied the Petition for rehearing on March 9,

1987. The Petition for writ of certiorari was filed on June 3, 1987. The court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATEMENT OF THE CASE

Respondent Landmark St. Louis Bank ("Landmark")[1], with the exception of the following clarifying statements, adopts the statement of the case set forth by Petitioners together with the factual statements set forth in the opinions of the Court of Appeals and the District Court (Pet. at 4-5; Pet. App. at A-2, A-6 to A-7).

The complaint alleges that the Glucks, while serving as officers, directors and publishers of the St. Louis Globe-Democrat, Inc. (the "Globe"), devised a scheme to defraud Globe employees such as plaintiffs and trade creditors of goods and services by creating an illusion of solvency. The Glucks are also alleged to have diverted Globe assets for personal enrichment. The Glucks accomplished the scheme by paying creditors and employees for goods and services with Globe checks drawn on accounts with insufficient funds maintained at Landmark. The Glucks also furthered the scheme through the alleged falsification of the Globe's financial statements and accounting books and records, and delivering the same to creditors.

Petitioners allege that the Gluck's objective after diverting the Globe's assets, was "to sell their Globe shares for the maximum price obtainable". The alleged scheme was to be fully accomplished and terminated upon either the sale by the Glucks of

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[1] Landmark St. Louis Bank has, since the filing of the complaint, been merged with other banks, the successor of which is Landmark Bank. The parent corporation of Landmark Bank is Landmark Bancshares Corporation. All affiliated corporations are wholly owned by Landmark Bancshares Corporation.

the Globe stock or the cessation of the Globe's business by reason of resulting insolvency.[2]

Landmark, beginning sometime in 1984, allegedly assisted and participated in the Gluck's fraudulent scheme through its role as sole depository of the Globe's business accounts and through performance of routine banking functions. Petitioners allege that "Landmark knew, or in the exercise of prudent business and banking practices, should have known that the Glucks were perpetrating their bad check scam..." and were looting and diverting its assets to their own benefit. It is further alleged that Landmark as agent for the Glucks knew or should have known that it would substantially assist the Glucks in committing the fraud by offering its banking facilities to the Glucks for use in the scheme, by profiting therefrom, and by taking no steps to prevent the Glucks from continuing the activities.

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[2] The Globe filed for Chapter 11 on August 19, 1985. The Order for Relief was issued on September 26, 1985. Petitioners filed the complaint on November 14, 1985.

ARGUMENT

I. The Eighth Circuit, Along With All The Other Circuits, Applies The Same "Continuity Plus Relationship" Test To The "Pattern" Element of RICO.

The Petitioners contend that the Court of Appeals failed to follow this Court's decision in *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479 (1985) where the Court discussed the meaning of the term "pattern of racketeering activity." *Id.* at 496 n.14. They also argue that the Court of Appeals' analysis is contradictory to the analysis of other courts of appeals.

In *Sedima,* the Court noted that the RICO statute requires proof that the violator conducted an enterprise through a pattern of racketeering activity. *Id.* at 496. The Court then explained that proof of a "pattern of racketeering" requires more than just the proof of two isolated unlawful acts. Instead the Court stated, because the statute was not aimed at the "isolated offender", the existence of a "pattern of racketeering activity" requires a showing of "continuity plus relationship" in the commission of the alleged predicate acts of racketeering activity. *Id.* at 496 n.14.

Since *Sedima,* nearly every court of appeals which has considered the "pattern" element has recognized that allegations of two or more predicate acts of racketeering activity, though necessary, may not be sufficient to satisfy both the "continuity" and the "relationship" prongs of the pattern requirement. Here, the Court of Appeals focused on the "continuity" prong. It held that the complaint, which alleged a single, isolated fraudulent scheme failed sufficiently to allege a "pattern" where the only predicate acts alleged — the use of the mails and wires — were components of the single scheme. In reaching this conclusion, the Court of Appeals applied the "continuity plus relationship" test suggested in *Sedima* and determined that the isolated scheme alleged did not meet the test of continuity because it was not alleged to be continuing or to have occurred previously.

The Eighth Circuit has consistently applied the "continuity plus relationship" inquiry suggested by *Sedima* with particular emphasis on the continuity prong. In line with the other circuits, the Eighth Circuit has held that allegations of a single ongoing fraudulent scheme could satisfy the continuity prong of the pattern test where the threat of continuing activity is sufficiently alleged. In *Superior Oil Co. v. Fulmer,* 785 F.2d 252, 257 (8th Cir. 1986), the court stated "that proof of a threat of continuing racketeering activities in the future could, in combination with ongoing acts of racketeering, be sufficient to establish a 'pattern of racketeering' ". *Id.* at 257. A pattern can also be established, the court suggested, by allegations that the defendants have "engaged in like activity in the past". *Holmberg v. Morrisette,* 800 F.2d 205, 210 (8th Cir. 1986).

The Petitioners suggest that the Eighth Circuit employs a sharply different approach from that employed by the majority of other circuits. Respondent suggests that there is no such conflict in approach and that, in any event, any distinction would make no difference in this case. The Petitioners contend that the Court of Appeals requires that a plaintiff allege different fraudulent schemes before the plaintiff can successfully allege a "pattern" of engaging in the predicate acts of mail or wire fraud. In making this argument, the Petitioners overlook the holdings of *Superior Oil* and *Holmberg* that allegations of predicate acts undertaken pursuant to a single fraudulent scheme can satisfy the "pattern" element where it is also alleged that the single fraudulent scheme is ongoing, open ended, continuous in nature, and, in particular, that it harbors a threat of continuity activity. *See, Ross v. Rice,* Fed. Sec. L. Rep. (CCH) ¶92,948 (N.D.Ala. 1986) (stating that all courts responding to this Court's invitation in *Sedima* "have uniformly held that mere allegation or proof of two or more predicate acts as part of a single scheme is insufficient if there is no demonstrated threat of continuity.") Accordingly, schemes that are distinct in purpose and necessarily finite in duration do not satisfy the "continuity" requirement.

A survey of the opinions rendered by the various circuits demonstrates that the Eighth Circuit's holdings in *Superior Oil* and *Holmberg*, rather than conflicting, are consistent with prevailing judicial attitudes.

In *Roeder v. Alfa Industries, Inc.*, 814 F.2d 22 (1st Cir. 1987), the First Circuit held that a single fraudulent scheme might satisfy the "continuity" requirement under *Sedima* where the predicate acts "threaten to be more than an isolated occurrence" and harbor a "threat of continuing activity". *Id.* at 30-31.

Similarly, the Second Circuit holds that the plaintiff must allege commission of "at least two acts that have the purpose of furthering a continuing criminal enterprise...", *United States v. Ianniello*, 808 F.2d 184, 192 (2nd Cir. 1986), *cert. denied*, 55 U.S.L.W. 3849 (U.S. June 23, 1987). A "continuing criminal enterprise" which has a single fraudulent purpose satisfies the continuity requirement where it exists to perpetrate a "fraud continuing indefinitely" and which has "no obvious terminating goal or date". *Id.* at 191-92. *Accord, Beck v. Manufacturers Hanover Trust Co.*, 820 F.2d 46 (2nd Cir. 1987) (holding that an alleged enterprise having "one straightforward, shortlived goal...is not sufficiently continuing to constitute an 'enterprise' "....)

The Fifth Circuit decision in *R.A.G.S. Couture, Inc. v. Hyatt*, 774 F.2d 1350 (5th Cir. 1985), also cited by Petitioners as a circuit opinion in conflict with the Eighth Circuit, has been sapped of all vitality in its own circuit and clearly presents no viable conflict with the Eighth Circuit.[3]

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[3] The precedential value of *R.A.G.S.* is questionable because it was decided only three months after *Sedima*, during the genesis of the post-*Sedima* review of the pattern requirement and has no analysis of "continuity" as suggested in *Sedima*.

R.A.G.S. is also unpersuasive because in two post-*R.A.G.S.* decisions, the Fifth Circuit ignored it. *See, Smoky Greenhaw Cotton Co.*

In the Seventh Circuit, the continuity element of a "pattern of racketeering" is adequately alleged where the predicate acts are sufficiently separate in time that they may be viewed as separate transactions. *Skycom Corp. v. Telstar Corp.*, 813 F.2d 810, 818 (7th Cir. 1987); *Marks v. Pannell Kerr Forster*, 811 F.2d 1108, 1111 (7th Cir. 1987). That Circuit, however, also holds that continuity requires allegations giving "some indication of a 'threat of continuing activity' by the defendants...". *Marks, supra*, 811 F.2d at 1111.

The Fourth, Ninth and Tenth Circuits, not mentioned by Petitioners, also recognize that where one fraudulent scheme is alleged, it must also be a continuous scheme and suggest a threat of continuing activity in order to satisfy the continuity test of *Sedima*. *See, International Data Bank, Ltd. v. Zepkin*, 812 F.2d 149, 154-55 (4th Cir. 1987) (stating that multiple predicate acts to perpetrate a single fraudulent scheme will not constitute a pattern of racketeering, except where a large continuous scheme is alleged); *Schreiber Distributing Co. v. Serv-Well Furniture Co.*, 806 F.2d 1393, 1399 (9th Cir. 1986) (requiring allegations of a threat of continuing activity in order to satisfy the "continuity plus relationship" test); *Torwest DBC, Inc. v.*

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v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 785 F.2d 1274, 1280-81, n.7 (5th Cir. 1986) (expressing no opinion as to whether the Fifth Circuit would follow the lead of courts requiring a showing of two fraudulent schemes, ongoing schemes, or the threat of continuing activity); *Cowan v. Corley*, 814 F.2d 223, 226-27 (5th Cir. 1987) (deciding the pattern issue in light of *Sedima* and without reliance on *R.A.G.S.*). More recently, in *Montesano v. Seafirst Commercial Corp.*, 818 F.2d 423 (5th Cir. 1987) the court questioned whether the treatment accorded the pattern requirement in *R.A.G.S.* was binding on the Circuit. *Id.* at 425. In any event, the panel urged that *R.A.G.S.* be overturned by the Circuit, en banc, and replaced by a test which would recognize that "[a] scheme to achieve a single discrete objective does not of itself create a threat of on-going activity, even when the goal is pursued by multiple illegal acts, because the scheme ends when the purpose is accomplished." *Id.* at 426. (citing, *Torwest DBC, Inc. v. Dick*, 810 F.2d 925, 929 (10th Cir. 1987).

Dick, 810 F.2d 925, 928-29 (10th Cir. 1987) (holding that a "plaintiff must demonstrate some facts from which at least a threat of ongoing illegal conduct may be inferred" and "[a] scheme to achieve a single discrete objective does not in and of itself create a threat of ongoing activity, even when the goal is pursued by multiple illegal acts, because the scheme ends when the purpose is accomplished."); *Condict v. Condict,* 815 F.2d 579, 584-85 (10th Cir. 1987) (activity that is bounded in time does not constitute a "pattern").

Finally, the Eleventh Circuit in *Bank of America National Trust & Savings Association v. Touche Ross & Co.,* 782 F.2d 966 (11th Cir. 1986), also "expressly adopted the threat of continuing activity as a prerequisite to finding a pattern." *Scheftelman v. Jones,* 636 F.Supp. 263, 267 (N.D.Ga. 1986), (citing, *Touche Ross, supra,* 782 F.2d at 971).

The preceding review demonstrates that each circuit, including the Eighth Circuit, has considered and adopted the "continuity plus relationship" analysis suggested by this Court in *Sedima* and that all courts hold that the "continuity" prong also requires an allegation that where a single fraudulent scheme is alleged, it must be ongoing, include separate fraudulent transactions, and harbor a threat of continuing activity.

This Court recently denied petitions for writs of certiorari in two cases which presented the same issue as that presented here. *Holmberg v. Morrisette,* 800 F.2d 205 (8th Cir. 1986), *cert. denied,* ____ U.S. ____, 107 S.Ct. 1953 (1987); *United States v. Ianniello,* 808 F.2d 184 (2nd Cir. 1986), *cert. denied,* 55 U.S.L.W. 3849 (U.S. June 23, 1987). Interestingly, in *Ianniello,* the Solicitor General's Office was of the view that there was no conflict between the Eighth Circuit and the others on this question. Brief for the United States In Opposition at 6-8, *Ianniello, supra.* This petition raises no new questions not raised by petitioners in *Holmberg* and *Ianniello.* No different result is warranted here.

II. The Decision Below Does Not Raise A Question Of Exceptional Importance Because The Complaint Does Not Allege A Pattern Of Racketeering Under The Reasoning Applied In The Allegedly Conflicting Decisions

The fraudulent scheme alleged by Petitioners would not, under the analysis applied by any of the circuits, amount to a pattern of racketeering activity because the conduct does not satisfy the "continuity" prong of the *Sedima* test under any of the analyses applied. Thus, this case is not an appropriate vehicle for review.

The scheme alleged by Petitioners was found by the Court of Appeals to be a single scheme, because it was not open ended, ongoing or continuous. Its admittedly limited objective was to prolong only the life of the Globe beyond its actual insolvency. By definition and design, the alleged fraudulent scheme involved only the Globe and would necessarily terminate upon the Globe's sale or insolvency. The alleged scheme in fact ended before the Complaint was filed.

This isolated conduct ought not to satisfy any circuits' formulation of the "continuity" requirement because, as found by the Court below, it constituted only a single, isolated alleged scheme, which was bounded in time and scope, distinct in purpose and harbored no threat of continuing activity. Lastly, no one alleged that Respondents had engaged in similar activities in the past or that they were engaged in like activities elsewhere.

Were this other than an isolated scheme, and therefore within RICO's purview, the plaintiffs would have alleged that the Gluck's operated other businesses in like manner or that Landmark continuously pursued such unlawful acts with the Glucks or other customers. The allegations here are thus in marked contrast with the allegations in *Ianniello, supra,* which involved distinct business entities involved in nearly identical acts on a continuous basis.

The decision below was, therefore, correct under any analysis.[3]

CONCLUSION

The Petition for writ of Certiorari to the Eighth Circuit should be denied.

Respectfully submitted,

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[3] The defective allegations of pattern are but one of the fatal deficiencies in the Complaint raised by Respondents below. Petitioners allege that Landmark knew or should have known of the fraud and failed to take steps to prevent it. It is well settled that where, as here, a RICO action is premised upon alleged acts of mail or wire fraud, the plaintiff must allege and prove specific criminal intent to defraud, mere knowledge being insufficient. *See, e.g., Armco Industrial Credit Corp. v. SLT Warehouse Co.*, 782 F.2d 475, 485 (5th Cir. 1986). Although this argument was not addressed or relied upon by either court below, it provides adequate independent legal grounds for affirming the dismissal of the complaint against Landmark. *Washington v. Yakima Indian Nation*, 439 U.S. 463, 476, n.20 (1979).

(3)

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On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF JEFFREY M. GLUCK AND DEBRA McALEAR GLUCK IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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OPINIONS BELOW

The opinion of the Court of Appeals for the Eighth Circuit is reported at 815 F.2d 1163 and is reprinted in the Petition Appendix. The District Court's Order and Memorandum is also included in Petitioners' Appendix.

JURISDICTION

The judgment of the Court of Appeals was entered on February 11, 1987, and the petition for rehearing en banc and the petition for rehearing by the panel were denied on March 9,

1987. These Respondents acknowledge that this Court has jurisdiction to hear the Writ.

STATUTES INVOLVED

The Organized Crime Control Act of 1970, Title IX (Racketeer Influenced and Corrupt Organizations), 18 U.S.C. §§1961-1968, as amended (RICO).

The relevant sections of these statutes are set forth in the Petition.

REASONS THAT THE WRIT SHOULD NOT BE GRANTED

A. This Court Should Not Grant Certiorari For Any Existing Conflict Presented By The Petition Is Resolved By Legislation Currently Pending In Congress.

Petitioners assert that this case presents a conflict with the decisions rendered by other federal circuit courts concerning the requirements necessary to constitute a pattern of racketeering activity pursuant to 18 U.S.C. 1961(1). Petitioners also assert that the decision below contradicts this Court's decision interpreting the pattern requirement in *Sedima S.P.R.L. v. Imrex*, ____ U.S. ____, 105 S.Ct. 3275 (1985). Petitioners claim that the decision below wrongfully requires the existence of two schemes to satisfy the pattern requirement. This Court should not issue certiorari because the alleged conflict asserted by Petitioners is resolved by legislation currently pending in Congress.

On October 7, 1986, the House of Representatives passed Bill No. 5445. *See, RICO Business Dispute Guide,* (CCH) ¶ 6041.50 (Feb. 1987). The Bill passed by an overwhelming majority of 371 votes in favor and 28 votes in opposition. *United States House of Representatives Legislative Calendar, Committee on the Judiciary,* 99th Cong., 1st Sess. and 2d Sess. 205 (1986). The terms of the Bill legislatively define the pattern requirement for purposes of RICO. The Bill replaces the term "racketeering activity" with the term "illicit activity" and will amend 18 U.S.C. 1964(c) to require:

> "For a civil action. . . the term 'pattern of illicit activity' requires at least two acts of illicit activity—
>
> "(a) one of which occurred not more than five years after the prior act of illicit activity;
>
> "(b) that are not so closely related in time and place that together the acts constitute a single episode . . ." (*RICO Guide, supra.*)

This Bill is currently pending before the Senate Committee on the Judiciary. *See, Legislative Calendar, supra.* The overriding

focus of Bill 5445 is to sharply limit the abuses of civil RICO. Most suits now being filed are, in essence, state actions which litigants have chosen to federalize as RICO suits. The adoption of the "multiple episodes" requirement in Bill 5445 will curb many of the abuses.

More importantly, the requirement of "multiple episodes" will legislatively abrogate the exact issue Petitioners wish this Court to decide in the instant case. This Court has placed a duty upon parties opposing certiorari to identify corrective legislation and its implications. In *Rice v. Sioux City Memorial Cemetary,* 349 U.S. 70 (1955), this Court noted the importance of the enactment of corrective legislation in determining whether certiorari should issue. In *Rice,* the lower courts denied Petitioner's constitutional claim and this Court subsequently granted certiorari. Following the grant of certiorari, the Court discovered that the State had enacted legislation that barred "the ultimate questions presented in this case from again arising ...." *Id.* at 73. As a result of the corrective legislation, this Court held that the case no longer presented "special and important" reasons for granting the writ of certiorari and dismissed the writ as improvidently granted. *Id.* at 77.

Justice Frankfurter, in delivering the opinion of the Court, noted that where corrective legislation is enacted, the Court should not adjudicate the case because the issues are no longer of importance to the public, but merely to the parties. *Id.* at 77, 79. *See also, Cook v. Hudson,* 429 U.S. 165 (1976) (writ of certiorari dismissed as improvidently granted where corrective legislation enacted after decision below); *Morris v. Weinberger,* 410 U.S. 422 (1973) (writ of certiorari dismissed as improvidently granted where Congress amended relevant statutory provisions twenty days after this Court granted certiorari); *District of Columbia v. Sweeney,* 310 U.S. 631 (1940) (certiorari denied because question is not of public importance where Congress repeals statute).

Another concern inherently arises in cases where this Court is asked to adjudicate an issue which is currently being corrected

by the Legislature. In these cases, the Court will expend its limited and valuable judicial resources to resolve an issue which the Legislature has, in essence, already resolved. The Court "should not risk inconclusive and divisive disposition of a case when time may further illumine or completely outmode the issues in dispute." *Rice,* 349 U.S. at 77.

The instant case is not an appropriate case for adjudication by this Court. In light of the current posture of the legislative proposal that expressly defines "pattern of conduct" for purposes of RICO, any action by this Court will soon be abrogated or outmoded and this Court should not grant Certiorari.

B. The Decision Below Does Not Raise Questions Of Exceptional Importance Which Should Be Settled By This Court.

Petitioners assert that the decision below conflicts with decisions rendered by other federal circuit courts on the interpretation of the pattern requirement of RICO. Petitioners have noted the different ways various circuits have postulated the "continuity plus relationship" requirement pursuant to this Court's decision in *Sedima S.P.R.L. v. Imrex,* ____ U.S. ____, 105 S.Ct. 3275 (1985). A review of the instant case reveals that in applying the RICO statute to the facts, the lower court's finding that the alleged acts lacked sufficient continuity to form a pattern is proper under any of the various circuits' rendition of the pattern requirement.

Although Petitioners identify five federal circuit court opinions which they argue are diametrically opposed to the decision below,[1] Petitioners fail to note that the incongruity is not in the

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[1] Petitioners cite the Fifth Circuit opinion in *R.A.G.S. Couture, Inc. v. Hyatt,* 774 F.2d 1350 (5th Cir. 1985). As Petitioners note in their brief, the court in *R.A.G.S.* did not articulate a specific definition of pattern, and thus the decision is not helpful to their case. Moreover, the viability of the *R.A.G.S.* decision was called into question in *Smoky Greenhaw Cotton Co., Inc. v. Merrill Lynch Pierce Fenner & Smith, Inc.,* 785 F.2d 1274 (5th Cir. 1986).

test the circuits apply, but in the circuit's articulation of the pattern requirement. Pursuant to this Court's famous footnote fourteen in *Sedima,* the circuit courts have all focused on the exact same test, whether the alleged acts of racketeering exemplify "continuity plus relationship" sufficient to show a pattern. This Court in *Sedima* directed lower courts, in deciding whether this test is met, to focus on numerous factors including whether the activity "embraces criminal acts that have the same or similar purpose, results, participants, victims, or methods of commission or otherwise are interrelated by distinguishing characteristics and are not isolated events." *Sedima,* 105 S.Ct. at 3285, n. 14.

Based on this directive, lower Courts have applied these various factors to divergent facts and it is only in articulating their reasoning that any alleged confict arises. The First Circuit recently stated its reasoning as, "[c]onstituent elements must be sufficiently related to one another and threaten to be more than an isolated occurrence." *Roeder v. Alpha Industries, Inc.,* 814 F.2d 22, 30 (1st Cir. 1987). The Second and Eleventh Circuits have articulated their evaluation of the numerous factors as requiring more than one racketeering act and the threat of continuity activity. *Bank of America National Trust and Savings Association v. Touche Ross & Co.,* 782 F.2d 966 (11th Cir. 1986); *United States v. Ianniello,* 808 F.2d 184, 191 (2nd Cir. 1986) ("continuing operation"). The Seventh Circuit has stated that the predicate acts must be ongoing over an identified period of time so that they can therefore be viewed as constituting "separate transactions". *Morgan v. Bank of Waukegan,* 804 F.2d 970, 975 (7th Cir. 1986).

In comparison, the Eighth Circuit has found no evidence of continuity unless there is proof that the defendant has engaged in illicit activities in the past or that they are engaged in other criminal activities elsewhere. *Superior Oil Company v. Fulmer,* 785 F.2d 252, 257 (8th Cir. 1985). Where evidence exists of only one fraudulent episode or scheme, no continuity exists. *Id.*

A review of the various renditions by the circuits reveals that all the courts are indeed focusing on the same test, "continuity plus relationship". Simply because the Eighth Circuit labels its continuity inquiry as a scheme, does not create a conflict. The semantic differences in the terms, episode, transaction, scheme, occurrence, or operation, does not create a "real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeals" to warrant a grant of certiorari. *Layne and Bowler Corp. v. Western Wellworks, Inc.*, 261 U.S. 387, 393 (1923). This Court has previously refused to grant certiorari on this same alleged conflict in the Eighth Circuit in the case of *Holmberg v. Morrisette,* 800 F.2d 205, *cert. denied,* 55 L.W. 3730 (Summary disposition, April 27, 1987). The issues presented in the instant petition are no different than the issues presented to this Court in *Holmberg*.

No matter how the inquiry is framed, the circuit courts are focusing on the same test, continuity plus relationship. The Eighth Circuit in the case below concluded that the facts alleged by Petitioners "lack sufficient continuity to form a 'pattern of racketeering activity'." (Petition, App. A-3.) Whether this determination is characterized by the First Circuit's language of "isolated occurrence", the Second Circuit's "continuing operation", or the Seventh Circuit's ongoing and "separate transactions" language, the result is the same. Petitioners did not meet the continuity requirements set forth by this Court in *Sedima*. The Petitioners did not allege any facts indicating that Respondents had engaged in like activities in the past or that they were engaged in any other criminal activity.

Under any of the circuit's characterizations, the activities of respondents in the instant case do not meet this Court's continuity plus relationship requirement necessary to state a pattern of conduct under RICO. The court below's decision in applying the RICO statute to the facts of this case is proper and this Court should not grant certiorari.

CONCLUSION

The instant petition does not raise any questions which should be settled by this Court. The court below correctly applied the RICO statute to the facts before it. In addition, any decision by this Court interpreting the pattern requirement of RICO is premature at this time, in light of the pending legislation resolving that issue.

Respectfully submitted,

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